1945.

File No. Transfer of Property II/45

Legal Department

B BRANCH

Subject:—

Rules and Notifications under the

Transfer of Property Act 1882

File No. Transfer of Property II/45

Gen. 194 e.

3441-B

No. 3799.

Office of the
Remembrancer of Legal Affairs.
Bombay Castle, 17th May 1945.

To

The Secretary to the Government of Bombay,
Home Department.

Subject:- Transfer of Property Act, 1882.
Amendment of section 13 of the --

Indian Succession Act, 1925
Amendment of section 113 of the---

Sir,

With reference to your letter No. 8817/4, dated the 9th March 1945, on the above subject, I have the honour to observe as follows:-

In view of the unhappy legal position created by the decision of the Privy Council in Gopher v. The Administrator General of Bengal, 46 I.L.R. p. 865 it appears that the Bombay Incorporated Law Society has made a representation to the Government of India for amendment of the Indian Succession Act and the Transfer of Property Act. The Government of India seem to be of the opinion that the proposal merits consideration and have asked for the views of the Provincial Government.

2. The decision of the Privy Council in Gopher v. The Administrator General of Bengal relates to the construction of sections 113 and 120 of the Indian Succession Act and it has been held that where under a bequest in the circumstances mentioned in section 113 of the Act, there is a possibility of the interest given to a beneficiary under the later bequest being defeated either by a contingency or by a clause of defeasance such a beneficiary does not receive the interest bequeathed to him in the same unfettered form as that in which the testator held it, and the bequest to him does not therefore comprise the whole of the bequeathed; and when such a beneficiary is not in existance. remaining interest of the testator in the thing at the

date of the testator's death, the bequest to him is void under this section.

3. The legal position hitherto clearly accepted under the Succession Act (and Transfer of Property Act) was that, within the limits of the rule against perpetuity, a bequest (or transfer on trust) can be made to an unborn person after a prior interest, provided the bequest (or settlement) is of the whole interest of the testator (or settlor). This view has now been expanded by the P.C. decision in Sopher vs. Administrator General, Bengal (1944 R.L.P. 865) which rules that even if the whole interest of the testator (settlor) is meant to vest in the unborn person, if it in any way happens tht the vesting of that interest is dependent on a contingency or is subject to possibility of defeasance (e.g. power of revocation in the settlement or will) the interest bequeathed (or settled) shall be treated as not the full interest of the testator (or settlor).

4. There is no doubt that the P.C. decision correctly intereprets sections 113 and 120 of the Indian Succession Act. This decision however cuts right across the long established legal opinion in India and renders inoperative tastamentary clauses relating to bequests of a limited nature to unborn persons. Since the Privy Council decision vitally affects settlements and wills already executed in accordance with the legal position hitherto accepted in India, a radical amendment of section 113 of the India Succession Act and section 13 of the Transfer of Property Act seems inescapable.

Your obedient servant,

16/-
P.N.M.
16/5/45.

Remembrancer of Legal Affairs.

N.N.D.
12/-